

April 28, 1998

Honorable Sadye E. Dunn  
Office of the Secretary  
Consumer Product Safety Commission  
Washington, DC 20207

Re: Flame Retardant Chemicals for Upholstered Furniture; 63  
Fed. Reg. 13,017 (March 17, 1998)

Dear Secretary Dunn:

On March 17, 1998, the Consumer Product Safety Commission (CPSC) issued a request for comments concerning the toxicity, exposure, bioavailability, and environmental effects of flame retardant chemicals that may be suitable for use in residential upholstered furniture. CPSC intends to evaluate the comments in order to determine whether to propose a standard to address hazards associated with small open flame ignitions of upholstered furniture.

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities.<sup>1</sup> The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities, the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings demonstrate an analysis of the impact that their decisions will have on small entities.

The Chief Counsel has reviewed the information contained in CPSC's March 17, 1998 request for comments, as well as the statement issued by Commissioner Mary Sheila Gall that explains her vote to withdraw the advance notice of proposed rulemaking on small open flame-ignited upholstered furniture.<sup>2</sup> Accordingly, the Office of Advocacy wishes to express serious concerns about the likely burden placed on upholstery related businesses (which are predominantly small in size) if CPSC were to impose a mandatory small flame standard for upholstered furniture.

The possible health risks to consumers and employees, and the economic burden on the industry, when compared with the benefits that can realistically be achieved, seem out of proportion. A careful analysis by CPSC of the economic impact (in conjunction with an analysis of alternative approaches) may address this problem adequately, but based on the information presented thus far, the problems seem insurmountable. Therefore, if

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<sup>1</sup> Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

<sup>2</sup> Press Release from Mary Sheila Gall, CPSC Commissioner; Statement of the Honorable Mary Sheila Gall on Options for Upholstered Furniture Flammability Project (March 2, 1998).

CPSC intends to move forward with proposing a mandatory small flame rule for upholstery, then certain minimum requirements must be met.

First, CPSC must demonstrate the need for the regulation. This may sound obvious, but CPSC has not provided sufficient data to convince this office, or Commissioner Gall, that a small flame standard would reduce accidental fires. Second, CPSC must consider relevant cost data and determine the impact on all affected small businesses. Third, CPSC must consider and analyze less burdensome alternatives that would accomplish the Commission's safety objectives. Granted, CPSC is only soliciting information for a future rulemaking at this stage in the process, but the basis for an adequate and thoughtful rulemaking begins at this stage.

*Why Regulate?* CPSC says that small open flame ignitions of upholstered furniture account for an estimated 3,100 fires, resulting in an estimated 100 deaths, 460 injuries, and \$50 million in property damage per year in the U.S.<sup>3</sup> However, CPSC's data does not distinguish between fires that were deliberately set, fires that were set by individuals with a history of setting fires, fires set by unsupervised children playing with matches, fires caused by very lengthy exposure to fallen candles, versus fires that are purely accidental in nature with short term exposure. Without an explanation of the data, there is no way to know whether or to what extent the problem can be cured by the proposed regulation. If the majority of the fires are set deliberately, or by other means which are not purely accidental, then no regulation is going to help reduce the problem. Acting without all the relevant facts or data means the industry will be confronted by costly regulations that serve no legitimate public policy objective. Agencies should identify the problem, identify who or what is contributing to the problem, and identify the conduct that needs to be changed. If all of these issues cannot be addressed with relative specificity, then DO NOT REGULATE.

*Costs/Small Business Impact.* Costs should be identified and fully explained. Costs may include new equipment for treating fabrics, lower profits caused by increased prices for more expensive treated fabrics, costs associated with additional environmental regulations and controls, costs associated with additional worker/employee protections or controls resulting from chemical exposure, and costs associated with maintaining flammability resistance over time (age, wear and tear may reduce flammability resistance). Other indirect, but significant costs may include increased litigation due to health-related problems associated with adverse chemical reactions. It is interesting to note that CPSC specifically requested comments on about 42 issues regarding toxicity, flame retardant chemicals, exposure and bioavailability, occupational issues and environmental issues; yet only two deal with the costs and impact on the industry.<sup>4</sup>

The costs will be borne by various small businesses, including textile manufacturers (cotton, synthetics, silk and wool—presuming that leather will not be included) and

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<sup>3</sup> 63 Fed. Reg. at 13,017.

<sup>4</sup> CPSC requests comments on the “cost of complying with additional regulations and implementing additional controls to protect workers, resulting from the use of FR chemicals in upholstered furniture, especially for small companies”, and on the “cost of complying with additional environmental regulations and implementing additional environmental controls, resulting from the introduction of FR chemicals into upholstered furniture, especially for small companies.” 63 Fed. Reg. at 13,019.

furniture finishers/manufacturers/refinishers. In the manufacturing sector, the Small Business Administration's (SBA) definition of a small business is generally employee-based. A small furniture manufacturer is one with 500 or fewer employees. A small cotton manufacturer is one with 1000 or fewer employees, and a small synthetic fabric/silk manufacturer is one with 500 or fewer employees. The retail industry may also be affected, but the focus of these comments shall be on manufacturing.

Using 1993 data supplied by the U.S. Bureau of the Census, SBA has derived statistics about furniture and upholstery manufacturers and other industries. Furniture manufacturers, for instance, may fall into the category of Wood Household Furniture (Standard Industrial Classification (SIC) code 2512), Metal Household Furniture (SIC code 2514), and Mattresses, Foundations, and Convertible Beds (SIC code 2515). Fabrics may fall into Broadwoven Fabric Mills for Cotton (SIC code 2211) and Broadwoven Fabric Mills for Manmade Fiber and Silk (SIC code 2221). Nearly 96% of the firms in the upholstered wood household furniture have fewer than 500 employees and are considered small by SBA; 93% of upholstered metal furniture; 87.5% of cotton mills (this percentage is for 500 employees although a small cotton mill is one with 1000 employees); 79% of manmade fiber/silk. It is perfectly clear that a substantial number, if not the vast majority, of the industry is small and will be affected by the suggested proposed rule.<sup>5</sup>

*Regulatory Alternatives.* The RFA requires agencies to prepare an initial regulatory flexibility analysis (IRFA) unless the agency determines and certifies that there will be no significant economic impact on a substantial number of small entities. The Office of Advocacy opines that CPSC will not be able to certify the rule and, therefore, should prepare an IRFA. One of the most important elements of an IRFA is giving consideration to flexible regulatory alternatives that reduce the burden on small businesses while still allowing the agency to accomplish its regulatory and public policy objectives. Alternatives in the instance case might include: issuing voluntary guidance for small flame resistance instead of a proposed rule,<sup>6</sup> requiring prominent warning labels on residential furniture about the risks of flammability, allow a number of different chemicals to be used when treating fabrics (rather than one specific chemical), exempt certain types of businesses like reupholsterers or antique furniture restorers, avoid process controls and requirements, support the development of consumer-applied sprays to increase small flame resistance, etc. All, some, or none of these alternatives may be feasible. The only way for CPSC to know is to analyze all significant alternatives.

The RFA is not intended to be a burden on agencies, but a tool to help agencies formulate rational, less costly rules. Please consider these comments as you continue to develop this rule. In the meantime, do not hesitate to contact the Office of Advocacy if we can assist you further on this or future rulemakings, 202-205-6945.

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<sup>5</sup> More data is available by contacting the Office of Economic Research at the Office of Advocacy, 202-205-6530, or by checking our website under small business statistics, [www.sba.gov/ADVO](http://www.sba.gov/ADVO).

<sup>6</sup> A 1997 study by CPSC found that 92% of individual cigarettes placed on upholstered furniture did not produce ignition. These results were based on the successful implementation of a voluntary industry program.

Sincerely,

Jere W. Glover  
Chief Counsel

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Asst. Chief Counsel for Advocacy

cc:

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